IN THE

SUPREME COURT OF THE UNITED STATES.

No. .....

ELI BUNCH, ***Petitioner,***

vs.

J. B. COLE AND T. B. MATHEWS, ***Respondents.***

PETITION FOR WRIT OF *CERTIORARI.*

To The Honorable The Supreme Court of the United States:

Your petitioner, Eli Bunch, most respectfully shows to this Honorable Court:

That on the 15th day of June, 1919, the petitioner brought in the District Court of Muskogee County, Oklahoma, an action against J. B. Cole and T. B. Mathews to recover from them the amounts collected by them from third persons for the rent of his land during the period of 1917 and 1918, when he was in the active military service of the United States, J. B. Cole, the principal defendant, having been chairman of the Council of Defense at Porum, Oklahoma, dur-

ing the same period. There was no dispute as to the facts. The plaintiff was an enrolled full-blood Cherokee Indian, who, under the Act approved the 27th of May, 1908, 35 Statutes 312, had only a limited capacity to make leases of his allotted land. Section 5 of that act provided in part:

> "Also any lease of such restricted land made in violation of law before or after the approval of this act shall be absolutely null and void."

It appeared that during the years 1917 and 1918, the defendants had rented out the allotted land of the plaintiff and had collected the rents therefor in the sum of $1274.75, and that the defendants had paid the plaintiff $75.00 on account of the rent of the land for 1917 and the plaintiff's mother $75.00 on account of the rent of the land for 1918. The defendants set up as a defense that they had the land under a lease made on July 5, 1916, by the plaintiff to commence on January 1, 1917, and under a lease made on July 28, 1917, by the mother of the plaintiff to commence on January 1, 1918; that it was stipulated by these leases that the plaintiff should receive $75.00 for 1917 and his mother $75.00 for 1918, and that these amounts had been paid and that such leases and such payments constituted a complete defense to the action by virtue chiefly of section 3783, Revised Laws of Oklahoma, 1910, governing tenancies.

The plaintiff contended that the leases were void under the laws of the United States and that the defendants could acquire no rights under such leases

and that they must account to him for the amounts they collected for the use of his land, and the plaintiff further contended that by reason of his being in the military service of the United States he was not in a position to look after his own land; that someone else must necessarily look after the land while he was away in the military service, and that the statutes of the United States, pursuant to which he was in the United States military service by necessary implication, gave him the right to require any person who looked after his property in his absence to deal fairly with him and prohibited such persons from taking advantage of unconscionable contracts made with his relatives, having his property in charge and especially that the chairman of the Council of Defense, who was the head of an organization formed to aid in carrying on the war, could not make any extortionate profit from the management of the land of an absent soldier. The second contention was upheld by the trial court, which rendered judgment in favor of the plaintiff for the rents from the land for the year 1918, but the trial court denied the first contention. The Supreme Court of the State of Oklahoma denied both contentions of the plaintiff made under the statutes of the United States and reversed the judgment with directions to the trial court to render judgment against the plaintiff and to dismiss his action. The final decision of the Supreme Court of the State of Oklahoma was made on the 7th day of February, 1922.

The leases involved in the action were unquestionably void. They were conceded to be void by the defendants at the trial. The leases were conceded to be void by the attorneys for the defendants in their opening statement to the jury. See pages 37-38 of the record. The trial court said:

> "The contract entered into in 1916 for the rent of this land in 1917 is conceded to be void." (Rec., p. 99.)

The trial court also said:

> "It is conceded that the contract made with the mother is void and of no effect." (Rec., p. 100.)

Among other reasons, these leases were void under the authority of the *United States* v. *Noble*, 237 U. S. 74, 59 L. ed. 844, and the following Oklahoma cases decided upon the authority of that case:

Brown v. *Vanpelt*, 166 Pac. 102;
Mullin v. *Noel*, 166 Pac. 742;
Taylor v. *Granger*, 174 Pac. 234,

all holding that leases made to commence in future by full-blood restricted Indians are void as the statute only permits leases in possession. The leases were also void for the reason that they were leases upon the homestead allotment of Eli Bunch, which by their terms expired more than a year from their date. Further argument is not needed to show the invalidity of the leases for the reason that such invalidity has so far never been disputed. The sole right to lease this land was derived from section 2 of the Act

approved May 27, 1908, being 35 Statutes 312. The Supreme Court of the State of Oklahoma held that where a lease prohibited by the Act of Congress is taken and possession of the rented lands is taken under such lease, then the lessee by virtue of section 3783, Revised Laws of Oklahoma, 1910, need pay only the rent stipulated in the void lease and that for the purpose of determining the rent to be paid the terms of the prohibited lease must be regarded. This is giving effect to the void lease. The decision is of great importance for the reason that it practically renders nugatory the statutes of the United States prohibiting the taking of leases from restricted full-blood Indians; and if the decision be good law, a man could contract to pay the Indian $5.00 per year for the use of his allotment, take possession under the contract and all he could be required to pay would be the $5.00. This would put a premium upon the taking of void leases, for possession, under the void lease, would validate the lease. The decision therefore not only affects this case but has a possible effect as to every lease made upon the land of a full-blood Indian, and the rule of law laid down in the opinion in this case ought not to stand for it allows a person taking the void lease to take possession of the land and then to defeat an action to recover the reasonable value of the use of the land. It was said in *Phillips* v. *Reynolds*, 113 N. W. 234, 79 Neb. 626:

> "An Indian may recover, in an action for mesne profits, the rental value of lands allotted to him by the United States Government, from

a person who has used and occupied the same under a lease that is void because not sanctioned and approved by the officers of the Interior Department."

The Supreme Court of the United States has held frequently that the state statutes and rules of state law cannot be used to validate directly or indirectly transactions with Indians which are prohibited by the laws of the United States. A few quotations from such opinions are as follows:

"Since it is entirely plain, in the case before us, that the title to the lands in question was retained by the United States for the reasons of public policy, and in order to protect the Indians against their own improvidence, it follows as a matter of course that a conveyance made by one of them, before the title was vested in him, pursuant to the Act of 1905, was in the very teeth of the policy of the law, and could not operate as a conveyance, either by its primary force or by way of estoppel."

—*Starr* v. *Long Jim*, 57 L. ed. 670 at 675, 227 U. S. 613.

"The provisions of the supplemental agreement having permitted no conveyance of an interest in the tribal lands prior to allotment, it is obvious that this policy cannot be evaded by giving to a conveyance with warranty or its equivalent, made prior to actual allotment, effect to convey an allotment thereafter to be selected either upon the ground of estoppel or because of any state statute having like force."

—*Mullen* v. *Pickens*, 63 L. ed. 1158 at 1161, 250 U. S. 590 at 592.

"A state statute could not make it the basis of passing subsequently acquired title when the federal statute pronounces it entirely void."

—*Monson* v. *Simonson*, 58 L. ed. 260 at 262, 231 U. S. 341.

"For, to permit an Indian's deed, void when made, to operate as a conveyance of title to lands subsequently allotted, would be to disregard the express language of the statute and defeat the protective purposes for which the law was passed."

—*Franklin* v. *Lynch*, 58 L. ed. 954 at 957, 233 U. S. 269.

By virtue of the statutes of the United States, the plaintiff had the right to have the leases taken by J. B. Cole and T. B. Mathews, which were prohibited by the laws of the United States, treated as void for every purpose and this right was denied by the state court. He had the right to have the state statute relied upon as defeating his action treated as repugnant to the statutes of the United States.

The petitioner also contends that by reason of the fact that during the years 1917 and 1918, he was in the active military service of the United States, pursuant to the laws of the United States, and was in a position where he could not himself look after his property, by necessary implication the laws of the United States gave him the right to have those who looked after his land in his absence deal fairly with him; and that by reason of the laws of the Unit-

ed States, such persons could not set up as a defense to his right to recover the amount collected by them, an unconscionable contract made with the ignorant full-blood mother of the plaintiff; and that the chairman of the Council of Defense, which was an organization formed pursuant to authority given by the laws of the United States, could not retain $1124.75 out of the rents collected by renting out the land of the plaintiff to third persons during the years he was in active military service of the United States. This question is of great public interest and ought to be passed upon by this court. The conceded situation is that the plaintiff was in active military service of the United States; that the chairman of the Council of Defense at Porum, Oklahoma, rented out his land and that the chairman of the Council of Defense had no valid contract with the plaintiff and had only a contract which was prohibited by the statutes of the United States. This claim of right was upheld by the trial court and denied by the Supreme Court of the State of Oklahoma and is worthy of the serious consideration of the Honorable Supreme Court of the United States, for when a soldier goes away to help carry on a foreign war, he cannot look after the property left behind, and the laws which take him away ought to be deemed to afford protection to his property in his absence, and the persons who voluntarily rented out the land ought to be deemed trustees and required to account for the proceeds.

The two questions above set out are the only questions involved in the case. They are both federal questions. They are both of great public interest.

Wherefore, your petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this court, directed to the Supreme Court of the State of Oklahoma, commanding said court to certify and send, to this court on a day certain to be therein designated, a full and complete transcript of the record and all proceedings in Case No. 11230, entitled *J. B. Cole and T. B. Mathews, Plaintiffs in Error, vs. Eli Bunch, Defendant in Error,* to the end that the said case may be reviewed and determined by this court, as provided by section 237 of the Judicial Code as amended, and that your petitioner may have such other and further relief in the premises as this court may deem appropriate and that the said judgment of the said Supreme Court of Oklahoma in said case and every part thereof may be reversed and set aside by this honorable court with proper directions.

ELI BUNCH,
By DENNIS T. FLYNN,
ROBERT M. RAINEY,
STREETER B. FLYNN,
WILLIAM NEFF,
LEWIS E. NEFF,
Counsel for Petitioner.

To J. B. Cole and T. B. Mathews and Their Attorneys of Record:

Please take notice that the above petition for a writ of *certiorari* will be filed in the office of the Clerk of the United States Supreme Court on May 6th, 1922, and will be submitted to the said United States Supreme Court on the next motion day thereafter and on May 8, 1922.

DENNIS T. FLYNN,
ROBERT M. RAINEY,
STREETER B. FLYNN,
WILLIAM NEFF,
LEWIS E. NEFF,
Counsel for Petitioner.

Due service upon us of the foregoing notice and of a copy of the foregoing petition is acknowledged this 22nd day of April, 1922.

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Counsel for Respondent.